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IN THE

Supreme Court of the United States

DAVID H. MILLS, DIRECTOR OF THE INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS,
Petitioner,

v.

MIDWEST TITLE LOANS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PUBLIC CITIZEN, INC., CENTER FOR RESPONSIBLE LENDING, AARP, CONSUMER FEDERATION OF AMERICA, INDIANA LEGAL SERVICES, INC., NATIONAL CONSUMER LAW CENTER, AND THE SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Public Citizen, Inc., Center for Responsible Lending (CRL), AARP, Consumer Federation of America (CFA), Indiana Legal Services, National Consumer Law Center (NCLC), and Sargent Shriver National Center on Poverty Law are non-profit organizations that advocate for consumer protection. Descriptions of each organization are in the Appendix.[1]

INTRODUCTION

In *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), this Court reversed a Seventh Circuit opinion by Judge Posner and held that Indiana could constitutionally regulate voting by shareholders of Indiana-chartered corporations, including out-of-state voting by nonresidents, to prevent abuse of the corporate form. Like the law upheld in *CTS*, the statute at issue here seeks to protect Indiana's citizens from abuse, in this case from predatory lending. As in *CTS*, the Seventh Circuit's decision calls for this Court's review.

The different approaches taken by *CTS* and the court below turn on a question of scope: Does a law violate the dormant Commerce Clause if *any part* of the regulated transaction occurs wholly out of state, or does the law violate the dormant Commerce Clause only if the *entire* regulated transaction occurs wholly out of state? That question, which has been the subject of persistent

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Counsel of record for the parties received timely notice of the intent to file this brief, and letters reflecting the blanket consent of the parties have been filed with the Clerk.

confusion in the lower courts, is enormously important. Its importance will only grow as changes in the economy force states to make new decisions about how to protect the health, welfare, and safety of their residents. Unpredictable Commerce Clause jurisprudence will likely chill legitimate state regulation, to the detriment of consumers and businesses alike.

STATEMENT

Midwest Title Loans charges Indiana borrowers an annual percentage rate (APR) of 300% for small amounts of cash secured by the titles to their cars. If a borrower cannot repay the loan at the end of the term, usually 30 days, he or she can extend the loan by paying a new round of fees. If a borrower defaults, Midwest can repossess the car in Indiana without going to court because, when it makes the loan, it takes a set of keys and records a lien with the Indiana Bureau of Motor Vehicles. These "car-title loans" present little risk to Midwest because the value of the collateral (the car) is usually twice the amount of the loan.

Midwest's business model is common to the car-title-lending industry, which at least 35 states now regulate.[2] A recent study of car-title-loan collection cases filed in Cook County, Illinois, determined that the median amount owed by defaulting title-loan borrowers was $5,462, but the median principal amount of the loans was

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[2] CFA, *Driven into Debt: CFA Car Title Loan Store and Online Survey*, Appx. A & B (2005), www.consumerfed.org/pdfs/car_title_loan_report_111705.pdf; Patrick Marley & Jason Stein, *Doyle Uses Partial Veto to Toughen Payday Loan Measure*, Milwaukee Journal Sentinel, *available at* www.jsonline.com/news/statepolitics/94195634.html.

only $1,500.[3] After repossession and sale of the collateral car, some lenders retain all of the proceeds, even if the value of the car exceeds the amount owed.[4]

Car-title loans are part of a class of predatory loan products that also includes payday loans—two-week loans made against the consumer's next paycheck, typically marketed as a cash advance to cover emergencies. The APR on payday loans is routinely more than 400% and, in some states, may be as much as 1,900%.[5] Like car-title loans, payday loan borrowers can "roll over" the loan, paying new fees every two weeks. Rollovers account for 76% of the payday-loan market and add $20 billion to the industry annually.[6] Payday lenders profit most from distressed borrowers.

Predatory lending has no single definition. A former director of the Office of Thrift Supervision adapted Justice Stewart's obscenity test: "[Y]ou tend to know predatory lending practices when you see them."[7] According to the Office of the Comptroller of the Currency, one indication that a lender engages in "abusive" lending prac-

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[3] Woodstock Inst. & Pub. Action Found., *Debt Detour: The Automobile Title Lending Industry in Illinois* 2 (Sept. 2007), www.responsiblelending.org/other-consumer-loans/car-title-loans/debtdetour_sept2007_egan.pdf.

[4] *Driven into Debt*, *supra* note 2, at 6.

[5] NCLC, Consumers Union, & CFA, *Small Dollar Loan Products Scorecard—Updated* (May 2010), www.nclc.org/reports/content/cu-small-dollar-scorecard-2010.pdf ("NCLC Scorecard").

[6] *Id.*; Leslie Parrish & Uriah King, CRL, *Phantom Demand: Short-Term Due Date Generates Need for Repeat Payday Loans* (July 9, 2009), www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf.

[7] Ellen Seidman, Office of Thrift Supervision, Dep't of the Treasury, *Strategies for Combating Predatory Lending in Our Neighborhoods* 2 (Feb. 23, 2000), www.ots.treas.gov/docs/8/87073.pdf.

tices is loans made on the liquidation value of the borrower's collateral, "rather than the borrower's independent ability to repay, with the possible or even intended result of foreclosure or the need to refinance under duress."[8] The Department of Defense, which has been concerned that service members' credit trouble affects combat-readiness, describes predatory loans as "featur[ing] high fees/interest rates ... while others pack excessive charges into the product. The result of their efforts is to obfuscate the comparative cost of their product."[9] The Department considers both payday loans and car-title loans predatory.[10]

States have a special interest in ensuring that car-title loans do not cause their residents to lose their cars because consumers who lose their cars are likely to lose their jobs.[11] As Congress has recognized, "two-thirds of all new jobs are in the suburbs," where public transit options are few, and "even in metropolitan areas with excellent public transit systems, less than half of the jobs are accessible by transit."[12] Loss of the family car can also impair consumers' ability to bring their children to school or reach medical services. A high-interest car-title

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[8] Office of the Comptroller of the Currency, *OCC Advisory Letter 2000-11: Title Loan Programs* 2 (2000), www.occ.treas.gov /ftp/advisory/2000-11.doc.

[9] Department of Defense, *Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents* 22 (Aug. 9, 2006), www.defense.gov/pubs/pdfs/Report_to_Congress_final.pdf.

[10] *Id.*

[11] *See* Tami Richards & Donald Bruce, *Car Access and Employment Outcomes for Tennessee Welfare Recipients* 1, 17 (June 2004), http://cber.utk.edu/TDHS/ffjun0400.pdf (people with access to cars more likely to become and to stay employed).

[12] Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 3037(a), 112 Stat. 107, 387 (1998).

loan of a few hundred dollars can cost a state like Indiana thousands of dollars in unemployment relief, emergency support, health care, and education.

States have been at the forefront of regulating predatory lending. Just last month, Wisconsin banned all auto-title lending in the state and began regulating payday lending.[13] Now, 36 states, including Indiana, stringently regulate some small loans.[14] These laws balance protecting consumers from predatory lending with keeping credit affordable.

At the same time, states that regulate predatory lending must be on the lookout for ways that the lending industry finds to skirt their laws. Some states take a general approach to this problem. For example, the Alabama Small Loans Act provides that the state's licensing requirements for lenders "shall apply to any person who seeks to evade its application by any device, subterfuge or pretense whatsoever." Ala. Code § 5-18-4 (2010). Other states have amended their small-loan laws' territorial application provisions—which define the circumstances under which the laws apply—to accommodate market changes that make it easier for out-of-state lenders to target their residents. For instance, the official comment to Kansas' Uniform Consumer Credit Code explains that its 2000 amendments were "driven primarily by a concern over the growing use of the Internet as a means for soliciting Kansas consumers to enter into credit transactions with out-of-state creditors." Kan. Stat. Ann. § 16a-1-201 cmt. 2 (2000). Similarly, Maine amended its statute in 2005 so that payday lenders

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[13] Marley & Stein, *supra* note 2.

[14] NCLC Scorecard. Wisconsin passed a bill regulating payday lending on May 18, 2010. *See* Marley & Stein, *supra* note 2.

"wherever located" that contract with consumers in Maine would be regulated by the Maine Law. Me. Rev. Stat. Ann. tit. 9-A, § 1-201 (2009).

This case will determine whether or not states will be able to continue protecting their own residents from predatory lending.

ARGUMENT

I. The Lower Courts Disagree On The Test For Determining Whether A State Law Has An Impermissible Extraterritorial Reach.

A. *Amici* agree with petitioner's articulation of the circuit split implicated by this case. Pet. 9-14. We write separately to highlight a distinct but related circuit split over the scope of conduct that courts should consider in determining whether a state law regulates "wholly extraterritorial" conduct.

This Court has adopted a two-tiered approach to analyzing state laws under the Commerce Clause. Regulations that directly regulate or discriminate against interstate commerce are invalid *per se*, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986), while those that regulate evenhandedly but nonetheless affect interstate commerce receive more lenient review under the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The *Pike* balancing test asks whether the challenged law's burden on interstate commerce outweighs any local interest furthered by the law. *Id.* at 142.

Under the Commerce Clause, a state may not regulate commerce occurring wholly outside its borders. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989); *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982); *see also Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 n.3

(8th Cir. 1995) ("It may also be correct to say that 'extraterritorial reach' is a special example of 'directly' regulating interstate commerce. The Supreme Court has not clarified this point."). Although this Court has spoken on extraterritoriality several times, it has not stated a test for determining whether a non-discriminatory state law incidentally burdens interstate commerce or whether it impermissibly regulates extraterritorial conduct. That determination is often dispositive because it dictates whether a court applies the rule of *per se* invalidity or the *Pike* balancing test.

"[I]t is inevitable that a state's law, whether statutory or common, will have extraterritorial effects." *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 825 (3d Cir. 1994). And the Court "has never suggested that the dormant Commerce Clause requires Balkanization, with each state's law stopping at the border." *Id.* The question, then, is what scope of conduct courts should consider in determining whether a law violates the restriction on extraterritorial regulation. Should the court look at the regulated transactions as a whole and consider whether the law regulates transactions not touching the regulating state? Or should the court fragment the regulated transaction and see if any piece of the conduct comprising the transaction occurs wholly out of state? The lower courts answer differently, depending on which of this Court's cases they turn to for guidance. In particular, three of this Court's cases feed the confusion.

First, in *CTS Corp.*, this Court upheld an Indiana anti-takeover law that regulated shareholder voting for corporations organized under Indiana law, even where some shareholders were nonresidents trading their shares out of state. 481 U.S. at 93-94. *CTS* overturned a Seventh Circuit decision holding that the Indiana law

impermissibly "depriv[ed] nonresidents of the valued opportunity to accept tender offers from other nonresidents." *Dynamics Corp. of Am. v. CTS Corp.*, 794 F.2d 250, 264 (7th Cir. 1986). The Court considered the whole transaction and concluded that "a State has an interest in promoting stable relationships among parties involved in the corporations it charters." *CTS*, 481 U.S. at 92; *see also Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 653-54 (2003) (upholding a Maine law regulating prescription drug prices in Maine against a claim that this regulation necessarily influenced the terms of out-of-state wholesale contracts).

The Court took a second approach in the "price affirmation" cases. Most notably in *Healy*, the Court invalidated a Connecticut law that required beer shippers to post the price of beer in Connecticut at the beginning of each month and to affirm, under oath, that the prices that they charged in Connecticut were not higher than the prices that they charged in neighboring states. The Court concluded that Connecticut's law set a minimum price for beer sold outside of Connecticut because the shippers could not lower the price in another state below the Connecticut price. "The critical inquiry," the Court said, was "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." 491 U.S. at 336. *Healy*, however, did not specify whether a state law would violate this rule if it controlled *any* out-of-state conduct at all, or if a law would violate the rule only if it dictated the terms of transactions unconnected to the regulating state.

Three years later, the Court took a third approach in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). There, the Court held that North Dakota's sales tax violated the Commerce Clause as applied to a mail-order business that had no contact with the state beyond advertising

and the use of common carriers to deliver its product. While acknowledging that a bright-line rule might appear "artificial at its edges," *Quill* held that a mail-order transaction lacks a "substantial nexus" with a state if the seller has no physical presence in the state. *Id.* at 316. And absent a "substantial nexus," the Commerce Clause bars states from taxing a transaction. *Id.* at 311. *Quill* did not explain whether the "substantial nexus" requirement is a form of the *Pike* balancing test or a threshold test that must be satisfied before applying *Pike* balancing.

B. Lower courts make inconsistent use of these three varying approaches. The First, Fourth, Sixth, and Eighth Circuits have decided that to determine if the *per se* rule applies, courts should consider the in-state and out-of-state elements of the regulated commerce as a whole. As long as the transactions covered by the regulation touch the regulating state, these courts apply the *Pike* balancing test. The Seventh Circuit, by contrast, has interpreted *Quill* and *Healy* to require that a law be held *per se* invalid if any fragment of the transaction occurs out of state.

For example, in *Pharmaceutical Care Management Ass'n v. Rowe*, the First Circuit upheld a Maine law imposing on pharmacy benefit managers (PBMs) conflict-of-interest disclosure requirements and a fiduciary duty to health-benefit providers. 429 F.3d 294 (1st Cir. 2005), *cert. denied*, 547 U.S. 1179 (2006). The PBMs argued that the law was invalid extraterritorial regulation because it would cover an out-of-state PBM that enters into a contract outside of Maine with a national insurer operating outside of Maine, if the national insurer were licensed in Maine. *Id.* at 311. The First Circuit upheld the law because, unlike the law in *Healy*, it did not give Maine the power to determine whether the transaction

in another state "could occur at all." *Id.* at 312. Instead, the court concluded that the law "simply required that PBMs, should they choose to do business *within* Maine, provide [health benefit providers] with certain information about their business relationships. In other words, the [Maine law] ... requires only that in-state commerce be conducted according to in-state terms." *Id.* The First Circuit reached that conclusion by looking at the whole transaction that the regulation touched—from the wholesale contract through retail sale in Maine—and determined that the subsequent retail sale in Maine made the transaction "in-state" commerce.

The Fourth Circuit likewise considers the transaction as a whole when deciding whether a law has an impermissibly extraterritorial reach. In *Underhill Associates, Inc. v. Bradshaw*, the court upheld Virginia's "blue sky law," which required brokers who advertise in Virginia to register with Virginia, even if they have no physical presence in the state. 674 F.2d 293 (4th Cir. 1982). The court cared neither that the broker lacked a physical presence in the state nor that sales would likely occur over out-of-state exchanges. Because the broker advertised in Virginia, the court determined that the regulation was not wholly extraterritorial and therefore applied the *Pike* balancing test, not the *per se* rule. *Id.* at 295. Following *Underhill Associates*, a district court in the Fourth Circuit has held that state registration requirements regulate *in-state* conduct even as applied to telemarketers advertising in state who neither have a physical presence in the state nor directly call consumers living in the state. *BlueHippo Funding, LLC v. McGraw*, 609 F. Supp. 2d 576, 587 (S.D. W. Va. 2009).

Similarly, in *Ferndale Laboratories, Inc. v. Cavendish*, the Sixth Circuit upheld an Ohio law requiring a Michigan pharmaceutical wholesaler that had no physi-

cal presence in Ohio to register with state authorities as a condition to distributing its drugs to Ohio middlemen. 79 F.3d 488 (6th Cir. 1996). The court rejected the argument that *Quill* required it to find a "substantial nexus" with the state and decided that *Quill* was inapplicable to a state's use of its police powers. *Id.* at 494. Instead, the court looked at the transaction as a whole and concluded that the Ohio registration requirement regulated the ultimate sale of drugs in Ohio. Therefore, the Court concluded, the law did not have an impermissible extraterritorial reach.

The Eighth Circuit takes the same approach when analyzing a law for extraterritorial reach. In *Southern Union Co. v. Missouri Public Service Commission*, 289 F.3d 503, 505 (8th Cir. 2002), the court upheld a Missouri law that required public utilities operating in the state to seek prior approval from the state's Public Service Commission before buying stock in another utility. Southern Union, a company in Texas, had sought blanket approval to purchase noncontrolling interests in out-of-state utilities. *Id.* at 505. The Commission had ruled that such approval would be detrimental to the public interest because investment losses could harm Missouri ratepayers. *Id.* at 506. The Eighth Circuit found *Healy* inapplicable because there was no "economic protectionism" at work. *Id.* at 508. The court articulated a holistic view of the transaction: "Though Southern Union's stock purchases are no doubt made from its corporate headquarters in Texas, the Commission scrutinizes these transactions because they potentially affect the company's regulated rate of return in Missouri." *Id.* Because Missouri's law "regulates interstate stock purchases because of their impact on Southern Union's regulated local activities," the court concluded that it was a permissible

"regulation of a local public utility for the protection of local Missouri ratepayers." *Id.*

In contrast, here, the Seventh Circuit, faced with an Indiana law protecting Indiana consumers, took a markedly different approach. The court quoted *Healy* for the proposition that "[t]he Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." Pet. App. 10a (quoting *Healy*, 491 U.S. at 337). Where other circuits view a "transaction" as encompassing an entire commercial undertaking (wholesale through retail), the court below viewed a "transaction" as any single component of that undertaking.

After fragmenting the undertaking into several pieces (advertising, contract, security interest, and enforcement), the Seventh Circuit took a formalistic approach to determining where each piece occurred. As Judge Posner put it, "[t]he contract was made and executed in Illinois, and that is enough to show that the territorial application provision violates the Commerce Clause." Pet. App. 18a. The court interpreted *Quill* to stand for the principle that a law may be invalid *per se* "even though the entity sought to be regulated received substantial benefits from the regulating state" in the same transaction as the purportedly extraterritorial conduct. *Id.* at 12a. Thus, although Midwest Title advertised in Indiana, perfected its security interests using the Indiana Bureau of Motor Vehicles, and repossessed property in Indiana, Indiana cannot require Midwest to register under its small-loan law because the parties signed the contract in Illinois.

The Seventh Circuit's fragmented approach determined the result in this case. Under *Underhill Associates*, the Commerce Clause would permit Indiana to ap-

ply its registration requirement based on advertising in Indiana. Repossession in Indiana would also have likely satisfied the courts in *Rowe* and *Ferndale*, where subsequent in-state sales through a third party were sufficient to trigger state registration requirements.

Looked at from the other side, under the Seventh Circuit's fragmented approach, cases with facts identical to those considered in the other four circuits would be decided differently than they were. For example, considering the law at issue in *Southern Union Co.*, the Seventh Circuit would have viewed the potential out-of-state stock purchases as isolated (and extraterritorial) transactions. If Southern Union, a Texas company, and the non-Missouri utility signed a stock purchase agreement outside of Missouri, the Seventh Circuit would say that the fact "that the contract was made and executed" out of state was "enough to show" that the Missouri law violated the Commerce Clause. *See* Pet. App. 18a. That the regulating state may have a significant interest in protecting its in-state ratepayers would have no effect on the Seventh Circuit's ruling because its analysis applies the *per se* rule. The Eighth Circuit, by contrast, determined that Missouri's law did not violate the Commerce Clause because the law was a "regulation of a local public utility for the protection of local Missouri ratepayers." *S. Union Co.*, 289 F.3d at 508.

This Court should grant the petition to bring clarity to the law and ensure that the circuits do not decide similar cases differently.

C. Confusion over how to analyze transactions creates a special risk of anomalies concerning Internet commerce, as shown by the differing treatment of Internet lending and Internet obscenity in the case law. For example, in *Quik Payday, Inc. v. Stork*, the Tenth Cir-

cuit upheld Kansas' Uniform Consumer Credit Code as applied to out-of-state online payday lenders who made loans to Kansas residents. 549 F.3d 1302 (10th Cir. 2008). The court did not fragment the transaction to see if any of the pieces was "wholly extraterritorial" but instead considered the whole transaction: "Even if the Kansas resident applied for the loan on a computer in Missouri, other aspects of the transaction are very likely to be in Kansas—notably, the transfer of loan funds to the borrower would naturally be to a bank in Kansas." *Id.* at 1308. Similarly, the Fourth Circuit applied *Pike* balancing, not a *per se* rule, when it struck down a law criminalizing the dissemination of obscene material to minors. *PSINet, Inc. v. Chapman*, 362 F.3d 227, 239-40 (4th Cir. 2004). And at least one state court has upheld a law criminalizing the distribution of obscenity to minors under *Pike* balancing where the law included a requirement that the offending party have "lured" the minor in some way. *State v. Backlund*, 672 N.W.2d 431 (N.D. 2003).

By contrast, the Second and Tenth Circuits have struck down laws criminalizing the dissemination of obscenity to minors under the *per se* bar on extraterritorial regulation because the dissemination occurs out of state. *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 98 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999); see also *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 177 (S.D.N.Y. 1997).

The Internet has facilitated an explosion in interstate commerce, such that states protecting their residents by regulating their brick-and-mortar businesses may find their regulations less effective. Disarray in offline applications of the Commerce Clause can only increase when applied to online commerce. States need to know the permissible scope of their regulations in order to regu-

late effectively. Consumers need to know which protections they should expect as they participate in our credit-dependent economy. And businesses need to know which laws they must follow.

II. The Decision Below Invites Manipulation and Imposes The Policies Of States With Weaker Regulation On Those With Stronger Regulation.

The decision below not only exacerbates confusion and anomalies in the law, but also leads to perverse consequences. The decision allows Midwest, which has borrowers sign documents in Illinois and then perfects its security interest in Indiana, to make an end run around Indiana's consumer protection laws. Pet. App. 14a. Below, both Midwest and the court of appeals emphasized that Midwest has never sought to use Indiana's courts to enforce its claims because the claims are too small to be worth the trouble of going to court. Appellee Br. 4; Pet. App. 15a. (Indeed, Midwest's business model ensures that it will never have to go to court in Indiana—it has the keys to the car and a lien on a car that is worth more than Midwest is owed.) The court below nonetheless recognized that if Midwest did bring a claim in an Indiana court, a standard choice-of-law analysis might lead the court to apply the law of Indiana, not Illinois, because Indiana has the "most intimate contacts" with the transaction. Pet. App. 15a. Thus, under the Seventh Circuit's analysis, the state with the greatest interest in the transaction is constitutionally precluded from regulating it. Midwest's business model thus uses the machinery of Indiana law (including Indiana's Bureau of Motor Vehicles) to create a property right in Indiana that no Indiana court would enforce, but that no Indiana court will have the chance to consider.

Midwest's business model is but one contemporary example of how the innovative lending industry attempts to out-maneuver lawmakers. Thirty years ago, mail-order catalogue companies whose customers made purchases on credit unsuccessfully attempted to skirt consumer protection laws by "deeming" all aspects of the transaction to have occurred in Illinois. *Aldens, Inc. v. Ryan*, 571 F.2d 1159, 1161 (10th Cir. 1978) ("The state can regulate the consequences of commercial transactions on [their] citizens which arise or are directed from outside its borders.").[15] Today, as noted above, the Internet presents an unprecedented opportunity for companies to access consumers outside the borders of their home states and thereby avoid inconvenient regulation. Another way for lenders to avoid state regulation is known as "rent-a-tribe"—partnering with a Native-American Tribe and then challenging the application of state law as extraterritorial regulation. *E.g.*, *State v. Maybee*, __P.3d __, 2010 WL 1878752 (Or. Ct. App. May 12, 2010) (upholding an injunction prohibiting an online cigarette distributor located on a Seneca Indian reservation from selling Oregon residents brands not registered with the State). In previous cases, the small-loan industry has successfully argued that the Commerce Clause bars states from regulating their in-state brick-and-mortar businesses if they make loans only to nonresidents. *Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280 (8th Cir. 1993).

The small-loan industry is expert in creating lawless spaces at the expense of consumers. If courts rely on formalism instead of looking at the whole transaction,

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[15] *See also Aldens, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979); *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977); *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975).

the dormant Commerce Clause will become a powerful mechanism for lenders to evade the laws of the states in which they do business.

The Seventh Circuit's approach also weakens states' ability to regulate in-state conduct. Where an out-of-state entity doing business in a state is exempt from that state's laws, the state has little choice but to exempt its domestic entities as well, so as not to put them at a competitive disadvantage. Accordingly, the vast majority of state legislatures have enacted "state parity laws" that exempt domestic businesses from predatory lending laws where out-of-state businesses operating in state are exempt.[16] As a result, the policies of states with weaker regulation overtake the policies of states that prefer greater regulation.

Moreover, states with weaker regulation may stand to gain valuable tax revenue and jobs if they can sufficiently relax their regulations to entice businesses. Regulating states do not share in these potential benefits, but they do bear the costs of non-regulation because their stricter laws do not apply to many businesses operating in their states. They can realize gain only by weakening their own laws, contrary to their policy preferences, so as to attract business. As a result, states are denied the ability to make a meaningful choice between regulating and not regulating. Only this Court can remedy that untenable state of affairs.

CONCLUSION

The petition for writ of certiorari should be granted.

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[16] Christopher L. Peterson, *Federalism and Predatory Lending*, 78 Temp. L. Rev. 1, 74-76 (2005).

Respectfully submitted,

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June 1, 2010

APPENDIX

APPENDIX

Description of Individual *Amici Curiae*

Public Citizen, Inc. is a non-profit consumer advocacy organization founded in 1971. Public Citizen has a longstanding interest in defending states' authority to enact and enforce laws that protect their citizens from unfair or deceptive practices, including predatory-lending practices like those at issue here.

Center for Responsible Lending is a non-profit policy, advocacy, and research organization dedicated to eliminating abusive consumer lending practices. CRL is an affiliate of Self-Help, a non-profit lender that has provided more than $5 billion in financing to help more than 50,000 low-wealth borrowers buy homes, build businesses, and strengthen community resources.

AARP is a non-partisan, non-profit organization of members aged fifty and older, many of whom live in Indiana. AARP is greatly concerned about high-cost lending practices that take advantage of borrowers already in financial distress by imposing exploitive terms, such as astronomical annual percentage rates, oppressive collection practices, and extreme default penalties. Because older persons are disproportionately victimized by these practices, AARP Indiana advocated for the passage of the statute that is at issue in this case.

Consumer Federation of America, an organization of 280 national, state, and local consumer groups representing more than 50 million consumers, advances the interests of consumers through advocacy and education. One of CFA's priorities is protecting consumers who are targeted by businesses making high-cost, short-term loans. CFA has published several reports on the auto title and payday loan industries. *See, e.g.*, Amanda Quester & Jean Ann Fox, *Car Title Lending: Driving Borrowers*

to Financial Ruin (2005); Jean Ann Fox & Elizabeth Guy, *Driven into Debt: CFA Car Title Loan Store and Online Survey* (2005).

Indiana Legal Services, Inc. provides poor residents of Indiana with a variety of aggressive, quality legal services to help them gain equal access to the courts; empower them to control their lives; and reduce poverty. As part of this mission, ILSI regularly represents clients in a wide variety of consumer matters, such as debt collection, unconscionable loans, credit card defense, foreclosure and repossession defense, and bankruptcy. This case will significantly affect the rights of low-income persons in Indiana, who deserve protection from the unfair and unconscionable practices of out-of-state lenders.

National Consumer Law Center is a nationally recognized expert in consumer credit issues, focusing specifically on the legal needs of low-income, financially distressed, and elderly consumers. NCLC was the primary author of the *Small Dollar Loan Products Scorecard*, a state-by-state analysis of lending limits for payday loans, auto title loans, and installment loans for all 50 states, issued by Consumers Union in May 2010.

Sargent Shriver National Center on Poverty Law is a national not-for-profit public interest law and policy center that provides national leadership in identifying, developing, and supporting innovative and collaborative approaches to achieve social and economic justice for low-income people. The Center's Community Investment Unit takes action against poverty by advocating for policies that expand asset-building opportunities for all and has advocated for consumer protection laws, including anti-predatory mortgage lending, payday, auto-title, and consumer investment loan reform, and discouraging tax refund anticipation loans.